

REMARKS

Claims 1-8 are pending in the application. The Examiner has rejected claims 1-8. Applicant has added claims 9-14 to overcome the informality objections.

Claim Amendments

Applicant has amended claims 1-8 to respond to the Examiner's objections. Claims 9-14 have been added to overcome the informality objections. No new matter has been added and no additional fees are believed to be due.

Claim Rejections – 35 U.S.C. §112

The Examiner has rejected claims 1-8 as being indefinite and as being in improper form. Applicant has amended the claims to place them in better condition for examination. Applicant kindly asks that the Examiner reconsider this objection.

Claim Rejections – 35 U.S.C. 103(a)

Applicant's Claims Are Not Rendered Obvious Under 35 U.S.C. §103 Over Any Of The Prior Art Patents

The Examiner has rejected Applicants' claims under 35 U.S.C. §103 based on *AEG Hausgeaete* EP1072221 A1 (AEG). Applicants respectfully disagree with the Examiner.

The Examiner has failed to establish a prima facie case of obviousness. When examining a patent application, the Examiner has the initial burden of factually supporting a prima facie conclusion of obviousness.¹ Additionally, when rejecting claims under 35 U.S.C. §103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness.² In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). Specifically, the Examiner must (1) determine the scope and content of the prior art; (2) determine the

¹ See, *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

² See, *In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988).

differences between the prior art and the claims at issue; and (3) determine the level of ordinary skill in the art.³ In addition to these factual determinations, the Examiner must also provide “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”⁴ Moreover, the analysis supporting obviousness should be made explicit and should “identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements” in the manner claimed.⁵

Only if the Examiner makes a prima facie case of obviousness, does the burden shift to the Applicant for providing evidence of non-obviousness.⁶ Obviousness is then determined based on the evidence as a whole and the persuasiveness of the arguments.⁷ Here, the Applicants respectfully assert that the Examiner has failed to meet the evidentiary burden.

Additionally, the cited prior art differs from the Applicants’ claims. Therefore, a person of ordinary skill in the art at the time of the invention would not have looked to the prior art cited by the Examiner to create Applicants’ claims. As such, the Applicants respectfully request that the Examiner reconsider Applicants’ claims.

A. Claims 1 - 8 rejected over *AEG*

With respect to claims 1-8, the Examiner has indicated on pages 3 of the Office Action that:

Hauseraete teaches a basket 1 which is used in dishwashers and including a drawer which slides on rails 3, 3’. The drawer is capable of holding utensils. Although the drawer is positioned over the basket, there is no reason that the drawer could not be positioned underneath the basket as an alternative mechanical equivalent and a matter of design choice for one having ordinary skill in the art at the time of the invention.

Here, the Applicants respectfully assert that the Examiner has not made a prima facie case of obviousness because *AEG* actually teaches away from Applicants’ invention

³ See, *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

⁴ See, *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

⁵ See, *KSR Int’l Co. v. Teleflex*, No. 04-1350, slip op. at 15 (U.S. 4-30-2007).

⁶ See, *In re Oetiker*, 977 F.2d at 1445.

⁷ See, *Id.*

and therefore, the person of ordinary skill in the art at the time of the invention would not have looked to *AEG* to create Applicants' invention. Specifically, the *AEG* teaches the use of the overhead basket which would destroy the utility of space creation above the basket. Further, it is not a simple matter to just place the basket under the drawer because it may, and would with the drawer in *AEG*, interfere with the spray arm therefor rendering the invention inoperable.

Therefore, *AEG* cannot render Applicants' invention obvious under 35 U.S.C. §103 because a person of ordinary skill in the art would not look to this piece of prior art to create Applicants' invention.

Conclusion

Applicants believe they have addressed and responded to every point raised in the Examiner's present action. For the reasons stated above, Applicants respectfully request reconsideration of their application.

Respectfully submitted,

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